

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS E. MITCHELL and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 98-2344; Submitted on the Record;
Issued July 24, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant was without fault in the matter of an overpayment of compensation that occurred during the period from December 16, 1995 to August 19, 1996; and (2) whether the Office of Workers' Compensation Programs properly refused to waive recovery of an overpayment of compensation that occurred during the period from August 20, 1996 to October 11, 1997.

The Office accepted that appellant's July 24, 1974 employment injury resulted in a permanent chronic lumbar strain, a cervical strain, aggravation of cervical osteoarthritis and a post-traumatic conversion reaction. The Office began payment of compensation for temporary total disability in July 1975.

On January 30, 1998 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,685.21, which occurred because she was entitled to augmented compensation for employees with dependents only until December 16, 1995, the date of her husband's death, but received such augmented compensation until October 11, 1997. The Office also preliminarily found that appellant was at fault in the matter of this overpayment for the reason that she did not timely notify the Office of her husband's death. Appellant requested a waiver of the overpayment and a telephone conference, which was held on March 18, 1998.

By decision dated May 4, 1998, the Office found that appellant received an overpayment of compensation in the amount of \$5,685.21 that occurred because she was entitled to augmented compensation for employees with dependents only until December 16, 1995, the date of her husband's death, but received such augmented compensation until October 11, 1997. The Office found that appellant was at fault in the matter of the overpayment from December 16, 1995 to August 19, 1996, when she notified the Office of her husband's death. The Office found that appellant was without fault with respect to the portion of the overpayment that occurred during

the period from August 20, 1996 to October 11, 1997, but refused to waive recovery of this portion of the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b):

"Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.¹ No waiver of an overpayment is possible if the claimant is not 'without fault' in helping to create the overpayment."

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact, which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information, which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect."²

The Board finds that appellant was at fault in the matter of the portion of the overpayment of compensation that occurred during the period December 16, 1995 to August 19, 1996.

Section 8110(b) of the Act provides that a disabled employee with one or more dependents is entitled to have his or her basic compensation augmented at the rate of eight and one-third percent of his or her monthly pay.³ The Office's CA-1032 forms, which appellant completed annually beginning in 1985, notify appellant of this provision of the Act and also notify her that she must immediately report to the Office any change in the status of claimed dependents. Appellant claimed her husband as a dependent on these forms she submitted annually, including the one she submitted on August 25, 1995. She did not notify the Office of

¹ 5 U.S.C. § 8129.

² 20 C.F.R. § 10.320(b).

³ 5 U.S.C. § 8110(b).

the December 16, 1995 death of her husband, her only claimed dependent, until she completed her next Form CA-1032 on August 14, 1996. The Office received this form on August 19, 1996. The Board finds that appellant was at fault in the matter of the overpayment that occurred during the period December 16, 1995 to August 19, 1996 for the reason that she failed to furnish information, which she knew or should have known to be material.

The Board further finds that the Office properly refused to waive recovery of the overpayment of compensation that occurred during the period from August 20, 1996 to October 11, 1997.

Section 10.322(a) of the Office's regulations⁴ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment.

In the present case, the Office found that appellant was without fault in the matter of the portion of the overpayment of compensation that occurred during the period August 20, 1996 to October 11, 1997. Through a telephone conference on March 18, 1998, the Office determined that appellant had income of \$2,671.01 per month and expenses of \$2,222.16 per month. The Office sent appellant a copy of its memorandum of this telephone conference and solicited any corrections or additions. The only corrections or additions appellant made were to reiterate that her car note, which the Office had reduced to a "reasonable amount" of \$400.00, was actually \$595.00 per month and to dispute the amount of compensation paid by the Office, contending that she received \$1,954.00 per month rather than the \$2,148.25 listed by the Office in its March 18, 1998 memorandum.

In its decision refusing to waive recovery of the portion of the overpayment of compensation that occurred during the period August 20, 1996 to October 11, 1997, the Office allowed appellant's car payment in the full amount claimed of \$595.00, making her total monthly expenses \$2,417.16. In this decision, the Office also explained that the amount of her monthly compensation calculated in the March 18, 1998 memorandum was correct at \$2,148.25, as the periodic checks appellant receives are issued every 28 days, not every month. The Office's figure arrived at by multiplying the amount of the periodic check by 13 and dividing the result by 12 is correct, as 13 of these checks are issued every 12 months. Appellant's monthly income of \$2,671.00 exceeds her monthly expenses of \$2,417.16 by over \$250.00 per month, which shows that appellant does not need substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expenses. The Office properly refused to waive recovery of the portion of the overpayment that occurred during the period from August 20, 1996 to October 11, 1997.

⁴ 20 C.F.R. § 10.322(a).

The decision of the Office of Workers' Compensation Programs dated May 4, 1998 is affirmed.

Dated, Washington, D.C.
July 24, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member